UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Served: 12/21/92

FAA Order No. 92-71

In the Matter of:	Docket Nos. CP91WP0222 EAJA210005 (CP90WP0196)
KDS AVIATION CORP. a/k/a KDS HELICOPTERS	

DECISION AND ORDER

KDS Aviation Corp. (KDS) has appealed from the written initial decision of Administrative Law Judge Edward C. Burch issued on January 30, 1992.[1/] In his decision, the law judge denied KDS's request for attorney fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504. The law judge found that Complainant was substantially justified in bringing the enforcement action against KDS. For the reasons set forth below, the decision of the law judge is affirmed.

The complaint against KDS alleged that on September 13, 1989, KDS operated a passenger-carrying helicopter flight, for

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1/ A copy of the law judge's written initial decision is attached.

revenue, in air transportation, without holding an air taxi/commercial operator operating certificate and appropriate specifications issued under Part 135.[2/] The helicopter in question was civil aircraft N911KH, a Bell 206 Jet Ranger. The flight was from Ontario to Riverside, California.

KDS admitted that this flight was subject to the requirements of Part 135. KDS also admitted not holding a Part 135 operating certificate, but denied that it had violated the regulations. According to KDS, the flight in question was operated by Sterling Air Services, Inc. (Sterling), a certificated Part 135 operator, under a lease with KDS.

Complainant voluntarily withdrew the complaint approximately 5 months after it was filed.[3/] KDS filed a request for attorney fees and expenses in the amount of $5,744.50.

2/ The complaint alleged that KDS violated Section 135.5 of the Federal Aviation Regulations, (FAR), 14 C.F.R. § 135.5. That section provides in part: "[n]o person may operate an aircraft under this part without, or in violation of, an air taxi/commercial operator (ATCO) operating certificate and appropriate operations specifications issued under this part...."

3/ Complainant advised the law judge that it withdrew the complaint because of the KDS-Sterling lease. The agency attorney did not receive a copy of the lease from KDS until 2 months before dismissal of the complaint. Under the lease, KDS leased helicopter N911KH to Sterling for a minimum of 20 flight hours per month, beginning on July 24, 1989. Subsequently, at the hearing on attorney fees, Complainant argued that it erred in withdrawing the complaint because, notwithstanding the KDS-Sterling lease, the evidence suggested that KDS operated the flight.

The law judge initially denied KDS's request for attorney fees and expenses on May 14, 1991. KDS appealed to the Administrator. The Administrator reversed the law judge's decision. The Administrator found that the voluntary dismissal of the complaint served to make KDS the prevailing party.[4/] The Administrator remanded the matter to the law judge for further proceedings to determine whether Complainant was substantially justified in bringing the enforcement action against KDS. See In the Matter of KDS Aviation Corp., FAA Order No. 91-52 (October 28, 1991). The law judge held a hearing on January 22, 1992, after which he issued the decision appealed here.

Attorney fees and expenses may be awarded to the prevailing party in an FAA civil penalty adjudication unless the agency's position was substantially justified. See Section 504(a)(1) of the EAJA, 5 U.S.C. § 504(a)(1); Section 14.01 of the Federal Aviation Regulations (FAR), 14 C.F.R. §14.01.[5/] The agency may establish that its position was

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4/ See 14 C.F.R. § 14.20(c)(4); see also Noxell Corp. v. Firehouse No. 1 Bar-B-Que Rest., 771 F.2d 521, 525 (D.C. Cir. 1985). Due to the outcome of this decision, there is no need to reexamine the issue of whether KDS became a prevailing party when Complainant withdrew, what it now believes was a meritorious complaint. See footnote 3, supra.

5/ Section 504(a)(1) of the EAJA, 5 U.S.C. § 504(a)(1) provides in part: "[a]n agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified...." Part 14 of the Federal

(Footnote 5 continued on next page.)

substantially justified by showing that its position was reasonable in law and fact. See Section 14.04(a) of the FAR, 14 C.F.R. § 14.04(a),[6/] see also Pierce v. Underwood, 487 U.S. 552, 565 (1988).

At the hearing the following picture emerged of what evidence was available to the agency attorney when she decided to file the complaint. A few days before the September 13, 1989, flight, FAA Supervisory Aviation Inspector Morgan Rodney was shown a newspaper advertisement in which KDS advertised "charters." The advertisement, which appeared in the September 1989 issue of Pacific Flyer, was brought to the FAA Riverside Flight Standards District Office (FSDO) by an employee of Hiser Helicopters, a local Part 135 operator. The FAA advised Hiser that KDS did not have a Part 135 certificate, and that a Part 135 certificate was required to operate charter flights.

On the day of the flight, Inspector Rodney was told by Floyd Hiser of Hiser Helicopters that in response to the KDS advertisement, Hiser arranged a charter with KDS from Ontario

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(Footnote 5 continued from previous page.)

Aviation Regulations (FAR), 14 C.F.R. § 14.01 et seq., contains the regulations implementing the EAJA. Section 14.01, 14 C.F.R. § 14.01 provides in part: "[a]n eligible party may receive an award when it prevails over the FAA, unless the agency's position in the proceeding was substantially justified...."

6/ Section 14.04(a), 14 C.F.R. § 14.04(a), provides in part: "[t]he burden of proof that an award should not be made to an eligible prevailing applicant is on the agency counsel, who may avoid an award by showing that the agency's position was reasonable in law and fact."

to Palm Springs, California. A Hiser Helicopter employee had arranged the charter with KDS without identifying his employer. As a result of Hiser's telephone call, FAA inspectors conducted a ramp check of KDS helicopter N911KH when it stopped in Riverside en route to Palm Springs.

The flight in question had two pilots, Patrick Jones, President of KDS, and Albert Cito, President of Sterling, and two passengers, Greg Fowler and John Galleta, both Hiser Helicopter employees. Fowler and Galleta did not identify themselves as Hiser Helicopter employees to either Jones or Cito. The two passengers told the FAA inspectors that although Jones was sitting in the co-pilot's seat and Cito in the pilot's seat, they saw Jones operate the controls during the entire flight. Jones and Cito told the inspectors that Cito, not Jones, operated the helicopter during the flight.

Jones did not explain to the Hiser employee who called to arrange for the flight, or to the Hiser employees who were the passengers on the flight that the flight would be conducted by Sterling, not KDS. Before takeoff, Jones requested payment in full for the flight and gave Fowler a KDS receipt for the $900 charter fee. After the flight was stopped by FAA inspectors at Riverside, Jones returned $400 to Fowler and gave him a second KDS receipt for $500, the amount charged for the distance traveled. Jones, not Cito, gave the safety briefing to the passengers at the beginning of the flight.

After the flight, the FAA inspectors confirmed with the Flight Standards District Office in Van Nuys, California, that Sterling was a certificated Part 135 operator. Cito was the

only pilot listed under Sterling's Part 135 operations specifications, which also authorized the use of a Bell 206 Jet Ranger helicopter.

Prior to filing the complaint, the agency attorney, therefore, had available undisputed evidence showing that KDS advertised as a charter operator in an aviation trade newspaper[7/] without holding a Part 135 certificate. She also knew that KDS arranged the flight in question as a KDS flight, without revealing that it would be operated by Sterling. Finally, she knew that a KDS employee gave the passenger safety briefing, collected the charter fees and gave KDS receipts in return.

The only disputed fact was the identity of the operator of the flight. The two pilots stated that Cito, a Sterling pilot, operated the controls, while the two passengers, employees of a competitor, testified that Jones, a KDS pilot, operated the controls.[8/] The agency attorney concluded that the sum of all the evidence suggested that KDS was the operator. As a result, the agency attorney filed the complaint.

In his written initial decision, the law judge found that it was reasonable for Complainant to have concluded, based on

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7/ A second advertisement for charters by KDS appeared in the October 1989 issue of Pacific Flyer.

8/ See United Brotherhood of Carpenters & Joiners of America, Local 2848 v. NLRB, 891 F.2d 1160, 1163 (5th Cir. 1990) (in attorney fees case, conflicting witness statements raising factual questions, justified government's desire to subject witnesses to direct and cross examination so that credibility determinations could be made).

the evidence, that KDS was the operator of the flight in question. The law judge, who observed the witnesses to the incident at the hearing, and heard their testimony, found that Complainant was substantially justified in bringing the action.9/

On appeal KDS renews its prior argument that Complainant was not substantially justified in bringing the action because the flight was legally operated by Sterling, not KDS. This argument must be rejected based on the evidence that was available to the agency attorney prior to filing the complaint. The KDS newspaper advertisements for charters, and KDS's arrangement of the flight in question without identifying Sterling, could reasonably be interpreted as demonstrating that KDS intended to operate the flight. The KDS receipts, Jones's safety briefing, and his insistence on collecting the charter fee before the flight began, support the interpretation that KDS was the flight operator. The agency attorney's reliance on the passengers' statements that Jones operated the controls on that flight was reasonable,

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9/ The law judge raised the additional point in his decision that it was also a violation of the regulations for KDS to advertise the charter flights without a valid operating certificate. KDS on appeal argues that advertising charter flights by a non-Part 135 certificate holder is not a violation. The law judge is correct; such conduct is prohibited. See Section 135.31, 14 C.F.R. § 135.31. Non-certificate holders who engage in Part 135 operations are subject to the requirements of Part 135. See Section 135.7, 14 C.F.R. § 135.7. The complaint, however, did not allege that KDS violated the regulations because it advertised charter flights. Therefore, the facts concerning KDS's advertisement of charter flights could only be used in this case as additional evidence supporting the allegation of operating without a Part 135 certificate.

especially in light of the other evidence suggesting that KDS was the operator.

KDS's remaining argument on appeal that FAA counsel was not justified in maintaining the action for five months because the agency attorney knew of the KDS-Sterling lease when she filed the complaint must also be rejected. When the agency attorney filed the complaint, she apparently believed that the evidence showed that Jones operated the helicopter. At that point, the KDS-Sterling lease became irrelevant because the operation of the flight required Part 135 certification which Jones' employer, KDS, did not possess. The agency attorney, furthermore, did not receive a copy of the lease from KDS until two months before the complaint was withdrawn. The law judge correctly found that a two-month period was not an unreasonable amount of time for Complainant to make and implement the decision to withdraw the complaint.

Complainant must show that it had a reasonable basis in law and fact for bringing and maintaining the action, not that it would have prevailed on the merits of the litigation. See United States v. 2,116 Boxes of Boned Beef, 726 F.2d 1481, 1487 (10th Cir. 1984). Whether Complainant would have prevailed in this case if it had not withdrawn the complaint, cannot and will not be answered now. What is clear from the record is that the evidence available to the agency attorney when she filed the complaint shows that the agency was substantially justified in bringing and maintaining the enforcement action.

Accordingly, KDS is not entitled to attorney fees and expenses. The decision of the law judge is affirmed.10/

THOMAS C. RICHARDS, ADMINISTRATOR
Federal Aviation Administration

Issued this 17th day of December, 1992.

10/ The applicant may, within 30 days after this determination, file an appeal with an appropriate United States Court of Appeals. 14 C.F.R. § 14.29.